

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27170-6-III

Respondent,

Division Three

v.

ROBERT TODD WALKER,

UNPUBLISHED OPINION

Appellant.

Sweeney, J. — An elements instruction is constitutionally flawed if it fails to state every essential element of a crime charged. *State v. Scott*, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988). The defendant here was charged with possession of a controlled substance. He contends that the elements instruction given to the jury at trial should have included a knowledge element. But the crime of possession of a controlled substance does not require proof of knowledge. *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). We, therefore, conclude that the instruction here was proper and we affirm the conviction.

FACTS

The State charged Mr. Walker with possession of a controlled substance pursuant to RCW 69.50.4013 after a search incident to a lawful arrest uncovered methamphetamine in Mr. Walker's car and pants pocket. The court instructed the jury on the elements of the crime. The instruction did not instruct the jury to find that Mr. Walker knew he possessed a controlled substance or knew the nature of the substance:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt and you must unanimously agree that:

- (1) That on or about the 9th day of February, 2007, the defendant:
  - (A) Possessed a controlled substance<sup>[1]</sup> in a bag, or;
  - (B) Possessed a controlled substance through residue in a pipe, or;
  - (C) Possessed a controlled substance both in a bag and through residue in a pipe;
- (2) That the said act or acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers at 67. Mr. Walker did not object to the instruction or offer an alternative.

The jury found Mr. Walker guilty of possession of a controlled substance.

## DISCUSSION

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<sup>1</sup> Jury instruction 9 stated, "Methamphetamine is a controlled substance." Clerk's Papers at 68.

Mr. Walker contends for the first time on appeal that the court erred by instructing the jury on the elements of possession of a controlled substance but not requiring proof of knowledge. “No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made.” *State v. Kroll*, 87 Wn.2d 829, 843, 558 P.2d 173 (1976). The record before us does not show that Mr. Walker proposed an instruction that included knowledge as an element of possession of a controlled substance. He, therefore, cannot challenge the absence of such an instruction for the first time on appeal. *Id.*

Moreover, Mr. Walker concedes that knowledge is not an element of possession of a controlled substance in Washington. He is correct. In *Bradshaw*, our Supreme Court expressly held that knowledge is not an element of possession of a controlled substance nor is knowledge implied by the crime’s element of possession. 152 Wn.2d at 537-38. The court held that the only essential elements of possession of a controlled substance are the nature of the substance and the fact of possession. *Id.* at 538. According to *Bradshaw*, then, the instruction here was proper because it set forth those two elements. And, like the *Bradshaw* court, we decline the invitation to interpret the crime’s possession element as implying a knowledge component like minor in possession of alcohol cases do. *Id.* We are bound by the *Bradshaw* decision until the Supreme Court concludes otherwise. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

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We affirm Mr. Walker's conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

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Sweeney, J.

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Kulik, A.C.J.

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Korsmo, J.